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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 363

STATE OF OHIO ex rel. DAVID KING,
Appellant,

v.

RAYMOND E. SHANNON, Presiding Judge, Municipal Court of Cincinnati, Ohio,
Appellee.

Appeal from the Supreme Court of Ohio

PETITION FOR RE-HEARING OF ORDER DENYING APPEAL

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November, 1950

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RAYMOND E. SHANNON, Presiding Judge, Municipal Court of Cincinnati, Ohio,

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PETITION FOR RE-HEARING OF ORDER DENYING APPEAL

Appellant, David King, prays that this Court grant rehearing of its order of November 7, 1960, denying appeal from the Supreme Court of Ohio, from its order in case number 36219 before it, issued April 13, 1960 affirming the judgment of the Court of Appeals, Hamilton County, Ohio denying writ of prohibition to prevent imposition of sentence under an unconstitutional ordinance and that appeal be granted to review the judgment of the Supreme Court of Ohio in the above entitled case as prayed for in the Jurisdictional Statement filed August 28, 1960 herein, upon the grounds set forth hereafter:

At the time of this Court's Order of November 7, 1960, the Court had not rendered its decision in the case of *C. G.*

Gomillion et al., Petitioners v. Phil M. Lightfoot, which decision was forthcoming on the 14th day of November, 1960, and is set forth in *29 U. S. Law Week (Supreme Court Edition) 1021.* In that decision, Justice Frankfurter, on behalf of the majority of the Court, stated as follows:

> "When a State exercises power wholly within the domain of State interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as instrument for circumventing a federally protected right. It has long been recognized in cases which have prohibited a State from exploiting a power acknowledged to be absolute in an isolated context to justify this imposition of an 'unconstitutional condition.'"

To apply this language to the instant case, the State of Ohio affords no mode whatsoever of review of constitutional validity of an *empowering* statute if said statute is not attacked by an individual defendant in the sole instance of original trial.

It might be sufficient for Ohio to deny on grounds of its own *any single* specific remedy to test the constitutionality of the subjugation of a course of federally protected conduct to criminal charges. But when it is revealed that Ohio forecloses *all* modes extraneous or posterior to the original trial, itself, then is not Ohio—to paraphrase—"exploiting a power acknowledged to be absolute" to the whole prevailment of an imposition of an "unconstitutional condition." (*Mooney* v. *Holohan*, 294 U. S. 103.)

It is respectfully submitted that Ohio, by its doctrine, laid down in *Yutze* v. *Copelan*, 109 O. S. 393, and the within cause affords no form of remedy for rectifying an unconditional condition once there has been even an unwitting failure to assert the same, or an intervening circumstance of substantial effect.

CONCLUSION

For the reasons set forth above and in the Jurisdictional Statement, it is respectfully urged that re-hearing be granted, upon the grounds that Ohio's foreclosure of all modes of post-judgment attack upon an unconstitutional condition is a violation of the 14th Amendment.

Respectfully submitted,

ALLEN BROWN,
Counsel for Appellant.

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing Petition for Re-Hearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court, in this, to-wit: that the language of *Gomillion et al., Petitioners* v. *Phil M. Lightfoot* (29 U. S. Law Week, Sup. Ct. Ed. 4024), indicates the further enunciation of a doctrine and rationale which is an intervening circumstance of substantial effect and was not available to the petitioner for previous presentation in this case.

Counsel for Appellant.

APPENDIX A

SUPREME COURT OF THE UNITED STATES

No. 363

OHIO ex rel. KING

v.

SHANNON, PRESIDING JUDGE, MUNICIPAL COURT OF CINCINNATI, OHIO.

Appeal from the Supreme Court of Ohio

Decided November 7, 1960.

PER CURIAM.

The appeal herein is dismissed for the reason that the judgment of the Supreme Court of the State of Ohio, sought here to be reviewed, is based upon a non-federal ground adequate to support it.